83-2096

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CAMERON CRANK,
PETITIONER

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

CHARLES D. REED
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QUESTION PRESENTED

Whether the due process rights guaranteed by the Constitution are violated where, at a hearing to revoke petitioner's license to practice dentistry, his counsel was permitted to withdraw, but the petitioner was denied a continuance for the purpose of obtaining new counsel, and was forced to proceed without representation at the hearing.

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John Cameron Crank petitions for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

OPINIONS BELOW

The Texas Supreme Court entered an opinion February 1, 1984 and, following the grant of a motion for rehearing, withdrew the slip opinion of its February 1 opinion and rendered a second opinion March 21, 1984. The February 1, 1984 opinion is reported at 37 Tex. 191, and, evidently, is not reported in the Southwest Reporter (Pet. App. B). The March 21, 1984 opinion is reported at 27 Tex. 287, 666 S.W.2d 91 (1984) (Pet. App. A). The opinion of the Court of Appeals, Twelfth Supreme Judicial District, Tyler is reported at 658 S.W.2d 182 (1983) (Pet. App. C).

JURISDICTION

The judgment of the Supreme Court of Texas was

entered March 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents an important and unresolved question of the boundary between the constitutionally guaranteed right of due process and right to counsel and the scope of this Court's opinion last Term in *Morris v. Slappy*, ____ U.S. ____, 103 S. Ct. 1610, 51 U.S. Law Week 4399 (decided April 20, 1983). The facts presented here fall far closer to the heart of the constitutional rights than those addressed in *Morris* and thus leave open a need for delineation by the Court.

The petitioner, a dentist, was accused of prescribing a controlled and addictive narcotic, in violation of federal and state laws governing dangerous substances and in violation of proper conduct as a dental licensee in Texas. Two formal complaints were brought against him by the respondent, the Texas State Board of Dental Examiners (the "Board"). The Board is an administrative agency which regulates licensure of Texas dentists. In essence, petitioner was accused of giving prescriptions for massive amounts of Dilaudid to certain patients and, in one instance, to a person who had never been a patient. The petitioner received notice of the first complaints October 9, 1979, and of the second complaint on March 27, 1980. Petitioner sought and received two continuances on the first complaint with the hearing then being set for February 29, 1980. The Board then unilaterally rescheduled this hearing at its own initiative from February 29, 1980 to March 1, 1980. Petitioner and his counsel appeared in Houston, Texas on March 1, 1980 at the time and place scheduled for the hearing and were then prepared to defend the charges. The Board, however, which was sitting in Houston, Texas, the home of petitioner, postponed the hearing due to the absence of a witness and set a rescheduled hearing, on both comlaints, in San Antonio,

Texas, for May 9, 1980. On April 28, the Board received a request from petitioner's counsel seeking a continuance of both hearings. This was, therefore, the first request for a continuance on the second complaint. It was also the third request by petitioner for a continuance of the other complaint, there having been an intevening continuance at the Board's initiative. The Board denied the April 28 requests.

On the day prior to the May 9 hearing, Martin Nathan, an attorney who had been requested by petitioner to take over his defense, telephoned counsel for respondent. Nathan informed Gauss that Nathan could accept the representation only if permitted an opportunity to prepare the case. On the morning of the hearing, petitioner and his then counsel appeared. Petitioner stated to the Board that, while his counsel "is a very fine attorney, we have reached philosophical differences in our approach to this case."

He stated his wish to substitute Nathan and indicated that Nathan had agreed, but only if allowed to prepare the case. Petitioner alluded to his prior readiness at the March 1 hearing and the Board's rescheduling at that time. He requested a continuance to enable Nathan to prepare himself.

The Board's counsel opposed the continuance, stating among other things,

> "*Now, I don't know what their philosophical differences are and frankly, could not care less at this point.* [Emphasis added]

And,

> "*I am in full and wholehearted support of [petitioner's] analysis of this case; that the charges are very serious.* If we are successful in persuading the Board that the charges are true and accurate, then it would seem to me that [petitioner] is probably a menace to society... [Emphasis added.]
>
> *I fully realize that in the present state of the matter if we go*

> *forward with this [hearing], that [petitioner] is going to be naked; he's going to be without counsel as I understand it...* [Emphasis added.]
>
> "[Petitioner's] prior counsel will not represent him, Mr. Nathan has not been retained as of this point [,] so there is no lawyer to represent [petitioner] in this matter, in this hearing.
>
> "Nevertheless, we feel like that is something of [petitioner's] doing. He has not been deprived of the opportunity to obtain Counsel. That opportunity has been given to him and he has had that full opportrunity. [...]
>
> *If proceeding with this matter, at this time, is a deprivation of Due Process of Law, then so be it.* I don't think it is under the circumstances...." [Emphasis added.]

Thereafter, the Board denied the requested continuance.

Counsel for petitioner requested the Board's permission to withdraw and asked the Board to note that the withdrawal was at the request, and with the consent, of the petitioner. The Board consented to the withdrawal of counsel and recessed briefly, after which the Board confirmed its prior decision and unanimously refused a further continuance.

The hearing proceeded in the petitioner's presence but without benefit of counsel for petitioner. Petitioner complained further of being without effective counsel.

The administrative hearing record is rife with proof that petitioner's complaints were justified. Two instances are noted:

After a witness was passed to petitioner for any questions, the Board's attorney interjected:

> "I think, Mr. President, at this time, that it probably is true—while the Respondent is not represented by Counsel, I think that he should be warned that he doesn't have to say anything, particularly, if what he says could possibly tend to convict him of a commission of a crime.
>
> "He has the Fifth Amendment protection and I think

that, certainly, if he were represented by Counsel that he would be so advised.

"I think it would be proper for this Board to advise it. He may ask cross examination type questions if he sees fit to do so. I believe he said he had none."

Again, when the Board's attorney sought to introduce a package of nearly 200 prescriptions for Dilaudid, petitioner was asked whether he acknowledged the prescriptions as his. There followed this remarkable exchange:

"[Petitioner]: Of these prescriptions, I wrote three of them. The others are obvious forgeries.

"[Presiding Board President]: You're saying that you wrote three and the others are forgeries?

"[Petitioner]: That's correct.

"[Counsel for the Board]: I think, Mr. President, that that will go the weight. These are the originals. It does certainly appear—We can see that it appears that the signature of [Petitioner] on three of these are identical; one being the prescription that was delivered to [a witness].

"We know that one is genuine. We submit that the rest of the prescriptions, except for the signature—and the Board can look at this and look at these and make a determination.

"I think that it's obvious that everything except the signature is in the same handwriting.

"[Presiding Board President]: Can [Petitioner] acknowledge which one of these is his? Would you do that, [Petitioner]?

"[Petitioner]: All right.

"[Counsel for the Board]: Well, why don't we do it this way. These are photostats. In order to be able to identify

which ones they are, I think probably they are 1, 11 and 16.

"[Petitioner]: These are the three that I wrote. The rest of these, none of the writing on the pieces of paper is my handwriting; not only is the signature not mine, the rest of the prescription is not in my handwriting. Anybody can see that."

The Board found petitioner guilty of all charges and voted unanimously to revoke his license to practice. An appeal was taken to the District Court of Harris County, Texas, which, applying a substantial evidence rule to administrative determinations, upheld the Board's action. The Texas court of appeals reversed, holding that petitioner was denied due process of law. The Texas Supreme Court reversed the court of appeals, stating that it could not say the Board's denial of a continuance was arbitrary.

(Petitioner was also indicted and tried in a Texas criminal court basically upon the same factual allegations which formed the basis of the Board's complaint. His conviction was ultimately set aside at the state's own initiative for lack of evidence.)[1]

REASONS FOR GRANTING THE PETITION

1. The right to counsel in criminal cases is both explicit in the fifth amendment and so well established as to be axiomatic in the concept of our system of justice. *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Powell v. Alabama,* 287 U.S. 45 (1932). This Court has, however, apparently never specifically held in a civil case that the right to counsel is implicit in the concept of the fifth amendment right to due process. On this basis alone, this case is a significant opportunity for this Court to state explicitly what it has previously indicated in the dicta of certain criminal

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[1]Harris County Criminal District Court, No. 300510, Dismissed September 15, 1980.

cases. *See, e.q., Powell v. Alabama, supra; Cooke v. United States,* 267 U.S. 517 (1925); cf., *Goldberg v. Kelly,* 397 U.S. 254 (1970).

2 It would not seem appropriate for so important a concept of constitutional dimension to be without authoritative guidance from this Court. This is not to suggest that the right to counsel in civil cases is without recognition by the lower courts. In the federal system, the Fifth Circuit, for example, has made recent, explicit statements on the issue. *Mosley v. St. Louis Southwestern Ry.*, 634 F. 2d 981 (1981), *cert. denied,* 452 U.S. 906 (1981); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (1980), clearly indicating the view that the right to retained counsel is an inherent element of due process. But if it be assumed that a civil litigant's right to retained counsel is constitutionally mandated, this Court's opinion in *Morris v. Slappy, supra,* poses the need for guidance for the civil arena just as its opinion in that case made clear that the right to counsel in a criminal case had certain limitations. The Texas Attorney General argued, and the Texas Supreme Court appears to have accepted, that this Court's announcement that "broad discretion must be granted trial courts on matters of continuances" is rationally applied to the circumstances faced by the petitioner.

That such an application could have been made underscores a certain urgency for this Court's further determination. In *Morris,* the petitioner was in fact represented by counsel through all stages of the trial. The issue was not whether he was entitled to counsel but whether the Constitution mandated that he be afforded the right to be represented by an appointed counsel who, having been assigned to the case, was unable to appear due to illness. Moreover, in *Morris* the substituted counsel (1) was deemed qualified by the petitioner himself, (2) announced to the Court that he was adequately prepared for the defense, and (3) was held by this Court to have performed his function to sufficiently high standards as to obtain an acquittal for his client on the major count against him. Finally, in *Morris,* the petitioner insisted that his counsel be changed in mid trial.

Here, petitioner was, as the Board's own counsel put it, "naked" in his own defense. The Board's counsel urged a

mechanical application of the Board's rules for requesting continuances—despite the fact that the record shows that the problems giving rise to petitioner's differences with his counsel occurred a day prior to the hearing and thus making impossible strict adherence to a requirement for five days' written notice.[2]

3. This Court in *Morris* admonished that criminal trials are not "games." The Board and the courts below were urged to view petitioner's request for counsel of his choice to be a game as well. Although not so characterizing petitioner's motion for a continuance, the reference to earlier continuances and the asserted failure of petitioner to show that his absence of counsel was not due to his own fault or negligence would seem to imply that gamesmanship was employed. The record would suggest the contrary. Petitioner appeared at the March 1 hearing ready to proceed. The nature of the differences of "philosophy," in any event, were beyond the assistant attorney general's stated level of concern and the Board was informed that a due process violation was occuring. If, therefore, a game was occurring, it was played by the Board and was one in which petitioner's ability to practice his profession was the macabre trophy sought.

4. In every denied request for a continuance, there inheres a balance test between the rights of an individual to access to a fair trial and the need for an orderly administration of justice. That test of necessity is administered at the first instance by the presiding judge or administrative official. The need to repose a certain discretionary authority is recognized, *Ungar v. Sarafite*, 376 U.S. 575 (1964), and, in the legal words of art which have arisen to describe it; the courts will not set asside the exercise of that discretion until and unless it amounts to "an abuse of discretion." Despite the essential subjectivity of an analysis of abusive discretion, the facts in this case remain (1) no inquiry

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[2]A requirement, which the Board did not feel constrained to apply mutually when it continued the case March 1 with no prior notice to petitioner.

was made as to the nature of the petitioenr's felt need to obtain a different lawyer, (2) documents which were not authenticated and which were denied by petitioner as "obvious forgeries"—a fact which the record seems to reflect as accepted—were considered by the Board, raising self-evident due process questions in its own right, (3) petitioner was warned that his statements at trial could be held against him, thus chilling whatever propensity he might have had to conduct an active defense in his own behalf, and (4) the devastating effect of the failure to have counsel is simply shown in the differing results between the civil case—in which he was unrepresented and lost—and the criminal case—in which he was represented and won.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES D. REED

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APPENDIX

APPENDIX

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APPENDIX A

SUPREME COURT OF TEXAS

No. C-2210

THE STATE OF TEXAS

v.

JOHN CAMERON CRANK, D.D.S.

Opinion Delivered March 21, 1984

Respondent's motion for rehearing of case is granted. Opinion of this Court of February 1, 1984 is withdrawn and opinion delivered this date is substituted therefor. (Opinion by Justice Campbell, Justice McGee notes his dissent.) (Withdrawn opinion of February 1, 1984 is reported at 27 Tex. Sup. Ct. Jour. 191.)

ON MOTION FOR REHEARING

This Court's opinion of February 1, 1984, is withdrawn on motion for rehearing and the following opinion is substituted therefor.

This is an appeal from an order of the Texas State Board of Dental Examiners revoking the license of John Cameron Crank, D.D.S. The order was appealed by Crank to the district court which found the Board's order had reasonable support in substantial evidence and rendered judgment affirming the Board's order. The court of appeals reversed and remanded the

trial court judgment and held that the denial of a continuance to Crank was an abuse of discretion and constituted a deprivation of Crank's due process rights to a fair representation before the Board. 658 S. W. 2d 182. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Dr. Crank was accused in two formal complaints of writing prescriptions for a controlled substance to persons who were not his dental patients. A hearing on both complaints was scheduled for 9:00 a.m. on May 9, 1980 in San Antonio. Notice of this hearing was sent to Dr. Crank on March 14.

On April 28, the Board received a communication from Crank's attorney of record asking for a continuance. The proceedings against Dr. Crank had been continued three times on one of the two complaints. Two of these continuances were at Dr. Crank's request. The Board unanimously denied Dr. Crank's third request for a continuance, this time on both complaints.

On the morning of May 9, the scheduled hearing on both complaints was convened with Dr. Crank present. Several minutes later Dr. Crank's attorney of record appeared. When the attorney for the State announced ready, Dr. Crank stated he and his attorney had reached "philosophical differences" in their approach to this case, and he wanted a continuance so he could substitute other attorneys. The substitute counsel, he claimed, had agreed to enter the case if allowed sufficient time to prepare.

The State's attorney opposed the request for a continuance. Thereafter, Dr. Crank said:

I am requesting that [my attorney] withdraw as counsel at this time.

After a brief recess, the Board President announced

"It is the unanimous opinion of the Board, Dr. Crank, that you are denied a further continuance. We have given you two continuances and we will continue on with the hearing today."

Following this announcement by the Board, Dr. Crank and

his attorney of record again made clear that Dr. Crank had discharged his attorney.

[Crank's attorney]: Well, what I want the record to be clear about is that Dr. Crank has requested that I withdraw and not that I request that I withdraw.

[Board President]: Would you like to make that statement, Dr. Crank?

DR. CRANK. Well, I thought I did. I have requested [that my attorney] withdraw.

The proceeding continued without counsel for Dr. Crank. The Board unanimously revoked the doctor's license. Dr. Crank contends the Board abused its discretion in refusing to continue the administrative hearing, and violated his due process right to "a fair representation before the Board." We disagree.

The court of appeals correctly noted that the ultimate test of due process of law in an administrative hearing is the presence or absence of rudiments of fair play long known to our law. *Rector v. Texas Alcoholic Beverage Commission,* 599 S. W. 2d 800 (Tex. 1980); Reavley, *Substantial Evidence and Insubstanial Review in Texas,* Sw. L.J. 239 (1969). The court of appeals stated that "[w]here a party's counsel has [1] voluntarily withdrawn from the case, or [2] a party by an emergency is left without legal representation, the courts have held such circumstances justified a continuance." *See Lowe v. City of Arlington,* 453 S. W. 2d 379 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Ullmen v. Dept. of Registration and Education,* 67 Ill. App. 3d 519, 385 N. E. 2d 58 (1978). The court stated this was Dr. Crank's circumstance and held the denial of the request for a continuance was an abuse of discretion and deprived him of his due process rights to fair representation.

We first note this is not a case where the party's counsel voluntarily withdrew, nor where a party, because of an emergency, was left without legal representation. In *Lowe* and *Ullmen,* the dispositive issue was not whether a party was left

without counsel when a continuance is denied, but whether it was an abuse of discretion to proceed when a party through no fault of his own is left without counsel. Dr. Crank voluntarily discharged his attorney and reaffirmed the discharge after his requested continuance was denied.

Dr. Crank has made no contention this is anything other than a civil proceeding. In civil cases in which the absence of counsel has been urged as grounds for a continuance or new trial, courts have required a showing that the failure to be represented at trial was not due to the party's own fault or negligence. *Strode v. Silverman,* 217 S. W. 2d 454 (Tex. Civ. App.—Waco 1949, writ ref'd); *Counts v. Counts,* 358 S. W. 2d 192 (Tex. Civ. App.—Austin 1962, no writ); *appeal dismissed,* 373 U.S. 543 (1963); *Van Sickle v. Stroud,* 467 S. W. 2d 509 (Tex. Civ. App.—Fort Worth 1971, no writ).

Further, granting or denial of an application for continuance rests within the sound discretion of the trial judge. *Hernandez v. Heldenfels,* 374 S. W. 2d 196, 202 (Tex. 1963). The action of the trial court denying the application will not be disturbed unless the record discloses a clear abuse of discretion.

Dr. Crank admitted he received notice more than a month before the May 9th hearing on the second complaint. Nevertheless, it was not until the morning of the hearing that Dr. Clark [sic] advised the Board he would not be represented by his attorney of record. Dr. Crank failed to show that his absence of counsel was not due to his own fault or negligence. Accordingly, we hold the Board did not abuse its discretion by refusing to grant a continuance based on absence of legal representation.

Crank also attacks the denial of his motion for a continuance on the ground that it deprived him of his due process right to counsel. We recognize the right to counsel and a fair representation at an administrative hearing is one of constitutional dimensions. *Mosley v. St. Louis Southwestern Railway,* 634 F. 2d 942, 946 (5th Cir. 1981), *cert denied,* 452 U.S. 906 (1981).

In *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964), the United States Supreme Court held:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a

> request for more time that violates due process *even if the party ... is compelled to defend without counsel. Avery v. Alabama,* 308 U.S. 444. Contrariwise, a myopic inistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Freytag,* 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [citations omitted] (emphasis added).

See also Morris v. Slappy, ____ U.S. ____ (1983).

Dr. Crank was granted two continuances on one of the complaints and had more than a month to prepare for the hearing on the second complaint. On the day of the hearing, Dr. Crank appeared with his attorney of record who was prepared to represent him. Dr. Crank requested his attorney withdraw from representation, stating to the Board that they had reached "philosophical differences." The Board unanimously denied the request.

Whether Dr. Crank's allegation that he had reached "philosophical differences" with his attorney is a good reason to grant a continuance is arguable, and another tribunal might well have granted a continuance in these circumstances. "But the fact that something is arguable does not make it unconstitutional." *Ungar, supra* at 591.

As stated in *Ungar,* whether the denial of a continuance is so arbitrary as to violate due process depends on the circumstances in each case. We cannot say the Board's denial of a continuance was arbitrary. We hold the denial was not a violation of due process.

By way of cross-point, Dr. Crank also contends his due process rights were violated when the hearing was held in San Antonio although the Rules of Procedure Governing Grievances, Hearings and Appeals provide that such hearings shall be held in Austin "unless for good and sufficient case" the Board designates another place of hearing. We hold this rule is not a

jurisdictional requirement.

Article 6252-13a, paragraph 19(d) provides that a substantial evidence review in the district court "is confined to the record, except that the court may receive evidence of procedural irregularities alleged to have occurred before the agency but which are not reflected in the record."

The record contains these facts. The notice informing Dr. Crank of the time of the hearing on the complaints designated San Antonio as the place of such hearing. Dr. Crank showed up in San Antonio at the scheduled time. He made no complaint to the Board about the location chosen by the Board for the hearing. While represented by counsel in the weeks preceding the hearing date, no complaint was made about the location of the hearing. Under these circumstances Dr. Crank waived any complaint he may have had on the point. This point is overruled.

Dr. Crank also contends that the signature of Board member Wm. Richard Knight, Jr., D.D.S., on the order by which Crank was disciplined indicated that Knight had participated in the decision or had received communications about the hearing in violation of provisions of the Administrative Procedure and Texas Register Act. Tex. Rev. Civ. Stat. Ann. art. 6252-13a. Although it is undisputed that Dr. Knight signed the order, it states that he was "ABSENT EXCUSED—NOT PARTICIPATING." The signature alone does not show a violation of the Act.

The judgment of the court of appeals is reversed. The judgment of the trial court is affirmed.

ROBERT M. CAMPBELL
Justice

Justice McGee notes his dissent.

APPENDIX B

SUPREME COURT OF TEXAS

No. C-2210

THE STATE OF TEXAS

v.

JOHN CAMERON CRANK, D.D.S.

Opinion Delivered February 1, 1984

This is an appeal from an order of the Texas State Board of Dental Examiners revoking the license of John Cameron Crank, D.D.S. The order was appealed by Crank to the district court which found the Board's order had reasonable support in substantial evidence and rendered judgment affirming the Board's order. The court of appeals reversed and remanded the trial court judgment and held that the denial of a continuance to Crank was an abuse of discretion and constituted a deprivation of Crank's due process rights to a fair representation before the Board. 658 S. W. 2d 182. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

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Dr. Crank's request. The Board unanimously denied Dr. Crank's third request for a continuance, this time on both complaints.

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The State's attorney opposed the request for a continuance. Thereafter, Dr. Crank said:

I am requesting that [my attorney] withdraw as counsel at this time.

After a brief recess, the Board President announced

"It is the unanimous opinion of the Board, Dr. Crank, that you are denied a further continuance. We have given you two continuances and we will continue on with the hearing today."

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[Crank's attorney]: Well, what I want the record to be clear about is that Dr. Crank has requested that I withdraw and not that I request that I withdraw.

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DR. CRANK. Well, I thought I did. I have requested [that my attorney] withdraw.

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Crank contends the Board abused its discretion in refusing to continue the administrative hearing, and violated his due process right to "a fair representation before the Board." We disagree.

The court of appeals correctly noted that the ultimate test of due process of law in an administrative hearing is the presence or absence of rudiments of fair play long known to our law. *Rector v. Texas Alcoholic Beverage Commission,* 599 S. W. 2d 800 (Tex. 1980); Reavley, *Substantial Evidence and Insubstantial Review in Texas,* Sw. L.J. 239 (1969). The court of appeals stated that "[w]here a party's counsel has [1] voluntarily withdrawn from the case, or [2] a party by an emergency is left without legal representation, the courts have held such circumstances justified a continuance." *See Lowe v. City of Arlington,* 453 S. W. 2d 379 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Ullmen v. Dept. of Registration and Education,* 67 Ill. App. 3d 519, 385 N. E. 2d 58 (1978). The court stated this was Dr. Crank's circumstance and held the denial of the request for a continuance was an abuse of discretion and deprived him of his due process rights to fair representation.

We first note this is not a case where the party's counsel voluntarily withdrew, nor one where a party, because of an emergency, was left without legal representation. In *Lowe* and *Ullmen,* the dispositive issue was not whether a party was left without counsel when a continuance is denied, but whether it was an abuse of discretion to proceed when a party through no fault of his own is left without counsel. Dr. Crank voluntarily discharged his attorney and reaffirmed the discharge after his requested continuance was denied.

Dr. Crank has made no contention this is anything other than a civil proceeding. In civil cases in which the absence of counsel has been urged as grounds for a continuance or new trial, courts have required a showing that the failure to be represented at trial was not due to the party's own fault or negligence. *Strode v. Silverman,* 217 S. W. 2d 454 (Tex. Civ. App.—Waco 1949, writ ref'd); *Counts v. Counts,* 358 S. W. 2d 192 (Tex. Civ. App.—Austin 1962, no writ); *appeal dismissed,* 373 U.S. 543 (1963); *Van Sickle v. Stroud,* 467 S. W. 2d 509

(Tex. Civ. App.—Fort Worth 1971, no writ).

Further, granting or denial of an application for continuance rests within the sound discretion of the trial judge. *Hernandez v. Heldenfels,* 374 S. W. 2d 196, 202 (Tex. 1963). The action of the trial court denying the application will not be disturbed unless the record discloses a clear abuse of discretion.

Dr. Crank admitted he received notice more than a month before the May 9th hearing on the second complaint. Nevertheless, it was not until the morning of the hearing that Dr. Clark advised the Board he would not be represented by his attorney of record. Dr. Crank failed to show that his absence of counsel was not due to his own fault or negligence. Accordingly, we hold the Board did not abuse its discretion by refusing to grant a continuance based on absence of legal representation.

Crank also attacks the denial of his motion for a continuance on the ground that it deprived him of his due process right to counsel. We recognize the right to counsel and a fair representation at an administrative hearing is one of constitutional dimensions. *Mosley v. St. Louis Southwestern Railway,* 634 F. 2d 942, 946 (5th Cir. 1981), *cert denied,* 452 U.S. 906 (1981).

In *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964), the United States Supreme Court held:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process *even if the party ... is compelled to defend without counsel. Avery v. Alabama,* 308 U.S. 444. Contrariwise, a myopic inistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Freytag,* 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [citations omitted] (emphasis added).

See also Morris v. Slappy, ____ U.S. ____ (1983).

Dr. Crank was granted two continuances on one of the complaints and had more than a month to prepare for the hearing on the second complaint. On the day of the hearing, Dr. Crank appeared with his attorney of record who was prepared to represent him. Dr. Crank requested his attorney withdraw from representation, stating to the Board that they had reached "philosophical differences." The Board unanimously denied the request.

Whether Dr. Crank's allegation that he had reached "philosophical differences" with his attorney is a good reason to grant a continuance is arguable, and another tribunal might well have granted a continuance in these circumstances. "But the fact that something is arguable does not make it unconstitutional." Ungar, supra at 591.

As stated in *Ungar,* whether the denial of a continuance is so arbitrary as to violate due process depends on the circumstances in each case. We cannot say the Board's denial of a continuance was arbitrary. We hold the denial was not a violation of due process.

The judgment of the court of appeals is reversed. The judgment of the trial court is affirmed.

ROBERT M. CAMPBELL
Justice

Justice McGee notes his dissent.

APPENDIX C

THE COURT OF APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT
TYLER, TEXAS

No. 12-81-0069-CV

JOHN CAMERON CRANK, D.D.S.

v.

THE STATE OF TEXAS, APPELLEE

Opinion Delivered April 14, 1983

This is an appeal from a judgment of the trial court affirming an order of the Texas State Board of Dental Examiners revoking the license of appellant John Cameron Crank, D.D.S., to practice dentistry. Such order was appealed by Crank to the District Court where the court found that the Board's order had reasonable support in substantial evidence and entered a judgment affirming the Board's order.

We reverse and remand.

Appellant Crank was licensed to practice dentistry in the State of Texas. He was accused of writing prescriptions for dilaudid, a controlled and highly addictive substance, to persons who were not, and never had been, his dental patients. Two docketed complaints were brought against Crank and after several postponements, two of which were at his request, the Board met in San Antonio on May 9, 1980, and held a hearing on such complaints. Prior to the hearing on May 9, 1980, Crank was represented by legal counsel. The hearing before the Board

convened at 9:00 a.m., as scheduled on that date, and neither Crank nor his attorney was present, but shortly thereafter both appeared. Crank announced to the Board that he was changing lawyers and requested a postponement of the hearing so that his newly hired counsel could adequately prepare to represent him. The Board allowed Crank's original attorney to withdraw but declined to grant a continuance and proceeded with the scheduled hearing with Crank present but without benefit of counsel.

Appellee proceeded to offer testimony at the hearing. Crank was advised by the appellee's attorney that any statement he made could be held against him in a criminal proceeding. The record reveals that Crank complained that he was not being adequately represented at the hearing. Several prescriptions for dilaudid purportedly made by Crank were offered into evidence and accepted by the Board. Crank replied that he had not written all of the prescriptions and that some were forged. Appellee's counsel argued that this would go to the weight of the evidence and the claim of forgeries should not disallow their admission. At the conclusion of the appellee's evidence Crank, stated he had nothing to add to his previous statement. The Board then unanimously voted Crank guilty and revoked his license.

Thereafter Crank with the newly hired counsel filed suit alleging that the order of the Board of Dental Examiners should be set aside and the cause remanded to the Board for a new hearing because of a denial of due process. The trial court originally granted a temporary restraining order followed by a temporary injunction enjoining the Board from enforcing its order preventing Crank from practicing dentistry. Upon final hearing of the appeal, the trial court held that there was substantial evidence to support the order of the Board, vacated the temporary injunction, denied a permanent injunction and remand of the cause for a new hearing, and rendered judgment for the Board affirming its order revoking Crank's license to practice dentistry.

Crank brings this appeal on five points of error: (1) the Board's denial of time for appellant to obtain counsel was a denial of appellant's right to respond, present evidence and

argument on all issues involved, (2) the Board's denial of time for appellant to obtain counsel was a violation of appellant's constitutional right of due process; (3) the Board's denial of time for appellant to obtain counsel was an abuse of discretion; (4) the Board violated its own rules by holding the hearing in San Antonio; (5) the Board illegally communicated with one member without notice to appellant of said communication.

Crank's first three points all deal with the Board's permitting Crank's attorney of record to withdraw at the hearing and then refusing to grant Crank time for his new counsel to prepare to represent him before the Board. These three points, all dealing with Crank's due process rights, will be considered together.

The record reflects that Crank had been represented by Gerald Holtzman for several months prior to the hearing. On May 7, 1980, there was a telephone conversation between Crank's counsel Mr. Holtzman and Robert Gauss, an Assistant Attorney General representing the Board. The record does not show any discussion relative to Holtzman's intent not to represent Crank at the scheduled hearing. On May 8, 1980, the day before the hearing, counsel for the Board was contacted by Martin Nathan who said that he had been retained by Crank to represent him in the place of Holtzman who no longer represented him. At the hearing on May 9, 1980, Crank stated that although Holtzman was a fine attorney, he was requesting that Holtzman withdraw as his counsel because of "philosophical differences." The record reflects that Holtzman stated that it was Crank's election that he withdraw, not Holtzman's. Crank further requested that Mr. Nathan be substituted as his attorney, stating, "Mr. Nathan has agreed to enter this case *only* if he is allowed sufficient time to acquaint himself with the facts and to prepare himself for the case." Crank at that time asked for a continuance.[1] After some discussion, the Board permitted the

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[1] "When Crank requested a continuance he further stated, "I would like to remind the Board, and everyone involved, that on March 1st of this year, there was a hearing set in this matter in Houston, Texas. At that time, Mr. Holtzman and I appeared ready to answer any and all charges. The Board postponed the hearing. We went along without protest. I think it is fair and in the interest of justice that a continuation in the matter be issued from this date."

withdrawal of Holtzman and denied Crank a continuance to obtain the services and representation of Nathan as his new counsel.

We are mindful that the granting or refusal of a motion for continuance is a mat ter within wide discretion of the court or administrative authority. The exercise of that discretion is, however, subject to review. Crank cites *Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55 (1932) for the well-settled position that "it is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." A fundamental element of due process is adequate and reasonable notice appropriate to the nature of the hearing. Such notice involves a reasonable time for preparation. It is evident from the record that Crank's original counsel had time to prepare for the hearing but the newly retained attorney was afforded no time to acquaint himself with the case and prepare to represent him before the Board. Every litigant is entitled to be represented by counsel of his own selection, and this is a valuable right and an unwarranted denial of it is fundamental error. It has been held that where the complaining party's attorney withdraws from the case, a continuance should be allowed for a reasonable time to allow the party to employ other counsel *and* to enable the new counsel to investigate the case and adequately prepare for trial or hearing. *See generally, Lowe v. City of Arlington,* 453 S.W.2d 379 (Tex. Civ. App. —Fort Worth 1970, writ ref'd n.r.e.); *Leija v. Concha,* 39 S.W.2d 948 (Tex. Civ. App. —El Paso 1931, no writ); *Illinois Bankers Life Association v. Theodore,* 55 P.2d 806 S(Ariz. 1936).

Crank cites *Thompson v. Texas St. Bd. of Med. Examiners,* 570 S.W.2d 123 (Tex. Civ. App. —Tyler 1978, writ ref'd n.r.e.), where the appellant alleged that the Medical Board abused its discretion in failing to grant a continuance in the administrative proceeding due to counsel's inability to prepare for such a proceeding on short notice. A careful review of *Thompson* reveals that an appeal of the Board's order to the district court proceeded under the substantial evidence rule

as in the instant case. On appeal to the district court an order is presumed to be valid and the burden is upon the one appealing from the order to show that the order appealed from is not reasonably supported by substantial evidence existing at the time of the entry of the order. *Thompson, supra* at 130; *Gibraltar Savings & Loan Association v. Faulkner,* 371 S.W.2d 548, 549 (Tex. 1963). In *Thompson,* the appellate court held that there was reasonable support by substantial evidence to uphold the Board's order, that the Board did not abuse its discretion in its refusal to grant a motion for continuance, and found no deprivation of due process of appellant's rights in that case. The proceedings of an administrative agency must meet the requirements of due process of law and the rules applicable to administrative agencies are subject to the general legal principles regulating judicial tribunals. The ultimate test of due process of law in an administrative hearing is the presence or absence of rudiments of fair play long known to our law. *Thompson, supra* at 130-31; Reavley, *Substantial Evidence and Insubstantial Review in Texas,* 23 SW. L.J. 239 (1969); *Martinez v. Texas State Board of Medical Examiners,* 476 S.W.2d 400, 405 (Tex. Civ. App. —San Antonio 1972, writ ref'd n.r.e.). It is particularly noteworthy for the disposition of the case at bar that in *Thompson,* the appellate court specifically noted that at the hearing before the Board the appellants *were represented by counsel and were able to cross-examine those witnesses testifying against them.* Moreover, the appellate court in *Thompson* noted that the appellants failed to set out what actual injury, if any, they suffered because the Board refused to grant a continuance of the hearing. For these reasons the appellate court in that case found no abuse of discretion. In the instant case from a review of the record and the proceedings before the Board it is readily apparent that had Crank been represented by counsel at the hearing, he would have had the benefit and assistance of his attorney in presenting his evidence, in cross-examining the Board's witnesses testifying against him, in making objection and response to inadmissable evidence and presenting oral argument in his behalf.

Crank cites the case of *Ullmen v. Dept. of Registration and Education,* 67 Ill. App.3rd 519, 385 N.E.2d 58 (Ill. App. Ct., First Div., Third Div., 1978), wherein an emergency situation left plaintiff without counsel at a hearing and the reviewing court held that the denial of a continuance was an abuse of discretion and reversed and remanded the case for a new hearing. An administrative body has broad discretion in ruling on a motion for continuance, but such discretion is *not* the equivalent of unbridled discretion. The court, in *Ullmen,* reasoned that a desire to dispose of a matter pending before an administrative body and to reach a speedy decision cannot be allowed to imperil the fundamental right an accused has to effective assistance of counsel; that while justice and speed are not mutually exclusive, if a judicial or quasi-judicial body must choose between the two, it must pick the side of justice. The court concluded that there should not be arbitrary discretionary acts and the appellant *must* have an opportunity to a full hearing, including the right to make oral argument, offer testimony, cross-examine witnesses and pose proper objections to the Board's evidence; and that where the appellant was deprived of the opportunity to cross-examine witnesses, this demonstrated one aspect of the prejudice suffered by the denial of a request for a continuance.

Appellee also cited *Ullmen* for the position that the exercise of the Board's granting or denial of a continuance is purely discretionary and should not be distrubed. It is the Board's contention that Crank had the opportunity to have counsel represent him at the hearing and that their denial of Crank's motion for continuance was not arbitrary or an abuse of discretion.

We have also reviewed the case of *Lewis v. Metropolitan S & L Ass'n,* 550 S.W.2d 11 (Tex. 1977), where the question was raised as to whether a denial of due process in the administrative hearing becomes immaterial and beside the point *if* the order can be said to have reasonable evidentiary support in the administrative record. In *Lewis,* at the hearing before the Board some evidence was not admitted and such exclusion of evidence was contested as being a denial of due process. The Court in its review of the case noted that the proceedings of an administrative agency *must* meet the requirements of due process of law as

well as the substantial evidence rule, and a determination by the courts of whether a particular administrative record fairly reflects compliance requires an examination of the whole record. The court, further stated that in the eyes of the law there is no hearing unless a fair opportunity is afforded the parties to prove their case before an administrative agency. *Lewis, supra* at 15. The court in *Lewis* held that an arbitrary action of an administrative agency cannot stand and that there is arbitrariness where the treatment accorded parties in the administrative process denies them due process of law. The Supreme Court in *Rector v. Texas Alcoholic Beverage Commission,* 598 S.W.2d 888 (Tex. Civ. App. —Beaumont), *rev'd and remanded per curiam,* 599 S.W.2d 800 (Tex. 1980), reaffirmed its holding in *Lewis, supra,* that even though the order may be said to have reasonable factual support under the precepts of the substantial evidence rule, such order is invalid for arbitrariness when the contesting parties are denied due process of law in the conduct of an administrative hearing.

The right to the advice and assistance of counsel is implicit in the concept of due process. This right is inherent in the very notion of an adversary system of justice and is indispensable to the effective protection of individual rights. The right to counsel and a fair representation at an adminstrative hearing is one of constitutional dimensions and should be freely exercised without infringement. *Mosley v. St. Louis Southwestern Railway,* 634 F.2d 942, 946 (5th Cir. 1981), *cert. denied,* 452 U.S. 906 (1981).

A review of the whole record in the instant case reflects that Crank was denied the fundamental right of due process when his motion for continuance was overruled, thus leaving him without the benefit and assistance of counsel who was in a position to effectively represent him at the hearing before the Board. The record reveals that the May 9, 1980 hearing involved two docketed complaints; whereas, the three previous continuances granted in the case (two of which were upon Crank's motion and one on the Board's motion) each postponed a hearing involving only the first of such complaints; that at the time of the Board's motion Crank appeared with his original counsel ready to proceed with a hearing on the single

complaint then docketed against him; and that no continuances had been requested or granted for the second complaint prior to the May 9, 1980 hearing before the Board. We do not agree with the Board's argument that Crank's *opportunity* to be represented by his former counsel with whom he disagreed and had "philosophical differences" was sufficient compliance with the requirements of due process. This was Crank's first motion for a continuance on one of the two docketed complaints, and a reasonable postponement of the hearing would have afforded a fair opportunity for his newly retained counsel to prepare his case on both complaints and represent him before the Board. Where a party's counsel has voluntarily withdrawn from the case, or a party by an emergency is left without legal representation the courts have held that such circumstances justified a continuance. To have denied a continuance under such circumstances would have left the party without counsel, as was Crank's circumstances in this case. Accordingly, we apply the same test and hold that the denial of a continuance to Crank under the circumstances herein was an abuse of discretion and constituted a deprivation of his due process rights to a fair representation before the Board. Appellant's first three points of error are sustained.

Since our ruling on appellant's first three points is dispositive of the case, we do not reach the remaining two points of error. Accordingly, the judgment of the trial court is reversed and the cause remanded for a new hearing before the Texas State Board of Dental Examiners.

J. W. SUMMERS
Chief Justice

APPENDIX D

THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 80-25659

JOHN CAMERON CRANK, D.D.S.

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS

March 2, 1981

STATEMENT OF FACTS
BEFORE THE HONORABLE DAVID HITTNER, JUDGE

APPEARANCES

Lawrence T. Newman, Esq.
Attorney at Law
2435 North Blvd., Suite 200
Houston, Texas 77098
Counsel for John Cameron Crank, D.D.S.

Bob Gauss, Esq.
Assistant Attorney General of Texas
Supreme Court Building
Austin, Texas 78711
Counsel for Texas State Board of Dental Examiners

Taken Before The Honorable Judge David Hittner

Also present:

Dr. John Cameron Crank, D.D.S.

STATEMENT OF FACTS

THE COURT: The Court calls Case No. 80-25659, John Cameron Crank versus the Texas State Board of Dental Examiners.

What says the plaintiff?

MR. NEWMAN: The plaintiff announces ready, Your Honor.

THE COURT: What says defendant?

MR. GAUSS: Defendant is ready, Your Honor, subject to the motion to strike the jury request.

THE COURT: That will all be ruled on.

Mr. Newman, do you need to say anything on the record besides your request for a jury trial?

MR. NEWMAN: Your Honor, we simply state that we have requested a jury trial and paid the jury fee more than ten days in advance of our setting request as required by the local rules and pursuant to Article—the appropriate Article, I believe it's 4549, which states there may be a jury trial. We are requesting—

THE COURT: Very well. What sort of issues would be submitted to a jury as far as your research?

MR. NEWMAN: Your Honor, it would be whether or not there is substantial evidence for the opinion or order of the Texas State Board of Dental Examiners.

THE COURT: What sort of evidence would you present to a jury if I decide to call a jury in this case?

MR. NEWMAN: Your Honor, we would present to the jury strictly the record of the hearing before the Board, the rules of the Board, and then we would present a few rules of evidence.

THE COURT: What sort of rules of evidence would you submit to a jury as a jury question aside from a law question?

MR. NEWMAN: Well, Your Honor, it would all be submit-

ted the same as a law question.

THE COURT: How can a jury rule on a law question? I don't mean to be unreasonable. I need to know what sort of a law question a jury can rule upon.

MR. NEWMAN: The statute specifically states the jury is to rule on substantial evidence and to show under the Administrative Procedure Act, we need to show simply that the Board failed to file the rules of evidence, that they violated the defendant's due proces, that they failed to permit the defendant to have counsel to represent him. I say the defendant, he's the plaintiff in this cause, he was the defendant before the Board, and all of this would be used under the Administrative Procedure Act to show there was no substantial evidence and the Board order should not be upheld.

THE COURT: Very well. The Administrative Procedure Act specifically states in Section 19, Subsection 3, that the Court sits without a jury and is or is not the Administrative Procedure Act applicable in this case?

MR. NEWMAN: Your Honor, I believe that that 4549 was enacted after the Administrative Procedure Act. It was enacted in 1977, and the latest enactment of it, the Administrative Procedure Act was enacted in 1975, therefore, these conflicts of 4549 prevails, Your Honor.

THE COURT: Of course there were a number of amendments to the Administrative Procedure Act. Do you know specifically when this Subsection 3 was added?

MR. NEWMAN: Your Honor, the latest amendment was in 1975 and the amendment to 4549 was in 1977. It says for instance here a number of amendments were added by the 676th Legislature in 1979. I am not sure if it's the one you have your mind on, but there were some amendments in 1979.

THE COURT: Very well. Anything further?

MR. NEWMAN: No, Your Honor.

THE COURT: Mr. Gauss, what says the State?

MR. GAUSS: Your Honor, we would insist upon our motion that this matter be submitted to the Court under substantial evidence. The matters as I understand them inquired about by the Court to counsel about the jury issues, what would be presented to a jury, as I understand his answer, these are all

legal questions. The record is quite complete. The question of whether or not he feels deprived of the right to counsel, now, the fact surrounding his failure to have counsel are all in the record and whether or not that's a deprivation of due process or not is a law question.

THE COURT: Of course, if we do follow the Administrative Procedure Act, that allows for the taking of some testimony, anything in addition to that depending upon the Court's discretion, and additional matters can be considered whether or not with a jury. Do you contest that as a correct interpretation?

MR. GAUSS: Your Honor, not entirely. The Administrative Procedure Act provides—

THE COURT: It says again, I have got it here before me instead of, you know—I am not testing anybody, but it states any party may apply to the Court for leave to present additional evidence and the Court if it is satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the agency may order that additional evidence be taken before the agency, as determined by the Court.

MR. GAUSS: That's before the agency, Your Honor.

THE COURT: That's correct. And it says the review is conducted by the Court sitting without a jury and confined to the record. If the Court may receive evidence of procedural irregularities alleged to have occurred before the agency which are not reflected by the record.

MR. GAUSS: It is our position that all these procedural errors that are alleged, the procedural errors they are speaking of are all reflected by the record. There is not anything that they have raised which is not reflected by the record.

THE COURT: You are opposing their request for jury trial based upon the controlling aspects of the Administrative Procedure Act over the Dental Practice Act, is that correct?

MR. GAUSS: Yes, sir, that would be correct if there is a conflict. We don't concede there is a conflict.

THE COURT: The ruling of the Court is that the jury will not be allowed on this case. It will be tried to the Court.

MR. NEWMAN: Please note our exception, Your Honor.

THE COURT: Let's go off the record.

(Whereupon a discussion was held off the record.)

THE COURT: Mr. Newman, what says the plaintiff at this time?

MR. NEWMAN: Your Honor, at this time the plaintiff withdraws their exception to the Court's ruling and formally waives their request for a jury trial.

THE COURT: Very well. That's so noted. Thank you.

Are we ready to proceed?

MR. NEWMAN: We are, Your Honor.

THE COURT: Now, according to the Act, request has to be made to the Court for in effect permission to proceed with additional testimony to amplify and/or to clarify matters not brought before the Board and certainly Mr. Gauss has a full opportunity to make note as to what materials he needs to go into. However, if you would like to now, you can make a formal request for what areas to go into.

MR. NEWMAN: Your Honor, at this time we request permission of the Court to introduce the rules of procedure which govern hearings before the Texas State Board of Dental Examiners.

THE COURT: All right. What else? Any objection to that?

MR. GAUSS: Yes, Your Honor.

THE COURT: We will get to it. I just want to know. So that would be the rules of procedure. Go right ahead.

MR. NEWMAN: Your Honor, we would also move to introduce a portion of the deposition of Mr. Richard Del Romano who was a witness at the hearing before the Board to show testimony which would have been brought out if Dr. Crank had been permitted to counsel to represent him to show entrapment, Your Honor.

THE COURT: All right. And what else?

MR. NEWMAN: Those are the two areas, Your Honor.

THE COURT: Anything further?

MR. NEWMAN: Your Honor, also we would ask to present evidence to show that the Board only presented a few prescriptions to Dr. Crank and admitted a very large quantity of prescriptions in their hearing.

THE COURT: I don't understand that.

MR. NEWMAN: In other words, Your Honor, the Board

record shows they presented copies of prescriptions to Dr. Crank before their admitting said prescriptions, but we want to show they only submitted a few to Dr. Crank and admitted approximately a hundred or two hundred prescriptions without offering them to Dr. Crank first before they were admitted.

THE COURT: Okay. Anything else?

MR. NEWMAN: Also, Your Honor, we would show that the Board knew that Dr. Crank had had prescription pads stolen and admitted that prescriptions on these pads without even trying to determine and over Dr. Crank's objections that they were forgeries without trying to determine they were actually Dr. Crank's prescriptions.

THE COURT: Let me ask you this, was the point of stolen prescription pads and forgery brought up at all before the Board?

MR. NEWMAN: Your Honor, Dr. Crank at one point simply said that those were not my signature. The Board said well, you can present that at your part of the hearing.

THE COURT: What hearing? Administrative hearing?

MR. NEWMAN: The Administrative hearing, Your Honor.

THE COURT: Was that ever presented?

MR. NEWMAN: No, Your Honor.

THE COURT: What happened?

MR. NEWMAN: Dr. Crank was not with counsel and simply sat there and listened to their evidence, did not know how to object to rules and present a defense in his own behalf.

MR. GAUSS: Your Honor, to address that last one first, we would object to that because number one, it would attempt to enlarge upon the record of the Board as to the knowledge of the Board that some of these pads were stolen and in response to the Court's question I would say this to the Court: That Dr. Crank chose not to testify. He did not take the oath. There were some comments that he made but nothing under oath by Dr. Crank at the hearing. He was offered the opportunity and he declined the opportunity.

THE COURT: Of course apparently his position is he did not have right to counsel.

MR. GAUSS: I understand that's his position.

THE COURT: How do you overcome that?

MR. GAUSS: Your Honor, the records—may I go into the records a little bit?

THE COURT: If it's a matter of record, yes, sir.

MR. GAUSS: Yes, sir.

THE COURT: Let's put it this way, we are in a rush to put a man's license to practice his profession on the line. I am not in any rush. You go into as much as you want as to the circumstances surrounding his failure to have counsel. This was in front of the Board of Dental Examiners?

MR. GAUSS: That's correct, Your Honor. Now, there were two cases, two different complaints that were filed against Dr. Crank. One of which had been on file many months, it had been set three times previously.

THE COURT: Which one was that?

MR. GAUSS: That was the earlier one that would be 1975—I mean, 1979-15 had been on file for several months. There had been three continuances before this hearing in May on that complaint. That two of these continuances had been at the request of Dr. Crank, one had been at the instance of the Board. Now, right up until and during all this time, all of this time Dr. Crank was represented by counsel, a lawyer here in Houston. On the evening before the hearing in San Antonio, we received a phone call at the hotel where the hearings were scheduled. When I say we, I am speaking of the Executive Director of the Board who called me in and we got on the phone. It was a conference type call, as I say, all of this is a matter of record. It's in the record. All that I am saying here is we got on the phone and a person who identified himself as Mr. Nathan said—

THE COURT: Mr. Nathan, Martin Nathan?

MR. GAUSS: Well, I think it turns out that's who it was. Mr. Nathan was on the phone and Dr. Crank was also on the telephone. We were told that those were the people on the other end of the line. On our end of the line on two separate telephone sets were the Executive Director and myself. Mr. Nathan advised the Excecutive Director and myself that Dr. Crank had contacted him I think probably that day and this was the eve of

the hearing, had contacted him that day and that Dr. Crank no longer wished Mr. Holtzman who had been representing him these many months to represent him and he wanted a continuance. Now, this came about after Mr. Holtzman some two weeks prior to that had asked for an additional continuance and he had stated that he had a conflict in Federal Court on that date and therefore he needed a continuance. Frankly that was checked out and it turned out that there was no such setting and even if there had been, the Federal Court here advised me that they would defer to previously set cases, even administratively set hearings, so the Board denied that motion for continuance. Now, this was about two weeks before the setting of May the 9th, but on the eve of the setting, well, we get this telephone call and so I told Mr. Nathan and Mrs. Nathan that it would be my inclination to advise the Board not to grant a continuance, that if he wanted to fire his lawyer on the eve of the hearing that that was his business, that we could not keep him from doing that, but that of all the lawyers in Houston, that if everytime we got ready to have a hearing he decided to fire his lawyer we would never get this thing heard. That was basically—

THE COURT: But he appeared, didn't he, the next day?

MR. GAUSS: The next day he appeared.

THE COURT: With any attorneys?

MR. GAUSS: Not at first. He appeared alone and I was in the process of making my spiel to the Board just as I am making to the Court right now about this telephone conversation the day before when Mr. Holtzman showed up and so the hearing was recessed and there were talks back and forth and so forth and so on and finally it was determined and the record will show this that Dr. Crank said no, I do not want—I do not want Mr. Holtzman to represent me and I want a continuance. The Board discussed it and they determined not to give him a continuance. He was admonished at all times that he had a right to a lawyer and certainly I—I conducted the hearing and I think the record will reflect that I bent over backwards as I knew how to bend so to see that he was not taken advantage of He was told that he did not have to testify if he did not want to, it was up to him.

THE COURT: He chose not to?

MR. GAUSS: That's correct. He did not tell his side of the story.

THE COURT: He did not?

MR. GAUSS: Absolutely not. He was given the opportunity on several occasions. Of course, I can say this, I think I would rather take a beating than oppose a pro se type individual. It's difficult to do, but he was told both by myself and the Board that he had the right to cross-examine these witnesses, but he would have to wait until the time came and when the time came he was told, "Now you may cross-examine if you have any questions you want to ask." And then when the Board rested its case he was again told, "Dr. Crank, do you have anything that you want to say? Do you want to testify?" He declined.

Now, these were the circumstances surrounding his failure to have counsel and of course we have taken the position and continue to take the position that his failure to have counsel, he was not deprived the opportunity to have counsel and I don't think the Board has to guarantee him counsel.

THE COURT: Let's move down the list. First off, they have enter into or at least present to the Court the rules of the procedure of the State Board of Dental Examiners as far as revocation of license.

MR. GAUSS: Your Honor, that's already a matter of record.

THE COURT: All right. The portion of the deposition of Mr. Del Romano?

MR. GAUSS: I don't know what he is talking about. It was not a deposition taken in connection with this case.

THE COURT: What deposition is this?

MR. NEWMAN: This was taken in connection with a criminal case, Your Honor, the District Attorney's office represented the State of Texas.

THE COURT: Very well. Position, Mr. Gauss?

MR. GAUSS: That should not be admissible.

THE COURT: Now it is admissible under the Rules of Civil Procedure at this point, a deposition taken in another case?

MR. NEWMAN: Your Honor, it goes to present evidence of entrapment, that the defendant was not permitted or was unable to bring out before the Board because he did not have

an opportunity to cross-examine Mr. Del Romano.

THE COURT: Was Mr. Del Romano at the Board?

MR. NEWMAN: He was a witness present at the Board. He was the one that testified the doctor wrote prescriptions without an examination.

THE COURT: So we are really talking about a lack of counsel, due process and lack of counsel?

MR. NEWMAN: That's correct, Your Honor, but we are going to show the harm of it.

THE COURT: Are you talking now about substantive due process or procedural due process?

MR. NEWMAN: Both, Your Honor.

THE COURT: Where is the procedural due process?

MR. NEWMAN: Under the Board Rules, the defendant in a hearing may be represented by counsel, he must waive counsel if he does not wish counsel.

THE COURT: Is it may or shall be represented? Is this a rule of the Board of Dental Examiners relative to revocation of licenses?

MR. NEWMAN: Yes, sir. It says he may be represented by counsel, but as far as appearing without counsel it says the defendant may waive counsel.

THE COURT: Mr. Gauss said—were you there at the hearing?

MR. NEWMAN: No, Your Honor, I was strictly on the record.

THE COURT: According to Mr. Gauss, he was informed he had a right to counsel and he declined, that he did not choose at that time to secure a counsel

MR. NEWMAN: Your Honor, that's like holding a gun to a person's head and pulling the trigger back, I mean the hammer back and saying now, you can either be shot like this or we can get you counsel and hang you because you know the Board knows that Mr. Holtzman was present, he said he would withdraw if the Board granted permission. If the Board had not granted permission, he was ready to represent the doctor. The Board knows if they let him withdraw and they will not continue, there is no possible way for the doctor to have counsel on one minute's notice so the Board while in substance saying you

can have your counsel, actually knew that by letting the counsel withdraw and making the doctor go on trial at that moment, they were depriving him of the right to counsel.

THE COURT: Of course, there had been apparently three prior continuances, one by the Board and two at the request of your client.

MR. NEWMAN: Yes, sir, but that was only on one of the two cases and they tried both cases, Your Honor.

THE COURT: At the same time?

MR. NEWMAN: Yes, sir, Your Honor. It was brand new.

THE COURT: There was a criminal indictment in this case but it was dismissed?

MR. NEWMAN: That's correct, Your Honor.

THE COURT: So the second tender, then, is a portion of the deposition of Mr. Del Romano. Did he appear in the criminal matter? It was taken in the criminal matter?

MR. NEWMAN: Yes, Your Honor.

THE COURT: Under what grounds again under the Rules of Civil Procedure can you admit portions of a deposition taken in another case, civil or criminal?

MR. NEWMAN: Your Honor, this is a certified copy on file with the Clerk of Harris County, Texas. I am asking that it be admitted as an official record of Harris County, Texas.

THE COURT: Once again I need you to show me where there is some rule that allows me to do that. I believe it's to the contrary, that a deposition taken in one case cannot be used in another case.

MR. NEWMAN: Your Honor, I am simply going on that a certified copy may be introduced into evidence.

THE COURT: Has that been submitted to the Court the requisite days ahead of time pursuant to the rules?

MR. NEWMAN: It is not, Your Honor.

THE COURT: Your position, counsel, concerning the deposition of Mr. Del Romano?

MR. GAUSS: My position is that it's not admissable because it was an entirely different proceeding. We were not a party to it, did not know about the deposition, had no opportunity to cross-examine, don't know who took the deposition.

THE COURT: Let's move on to the next point. The next

point of tender is that they desire to submit more prescriptions than were tendered before the Board in San Antonio.

MR. NEWMAN: We don't desire to submit more, simply to show that more prescriptions were admitted by the Board than were shown to the doctor before they were admitted.

THE COURT: Assuming that is correct, Mr. Gauss, just for argument's sake, what is your position on that? Are they permitted to do that? I am not saying they did it, but let's assume that they identified a few and admitted you are saying about 200?

MR. NEWMAN: Yes, sir.

MR. GAUSS: Your Honor, my offhand opinion is that that probably would be wrong to do that but I don't think it happened.

THE COURT: Let me hear your position, then, from that point.

MR. GAUSS: Your Honor, I would have to go back, and the record will reflect what was done and I frankly—my memory is not that clear on it. I don't think we did that but I do know that it might have been done, and if so it was an oversight. That does not excuse it, I understand that, but I do know that almost everything we introduced that we offered we handed it to Dr. Crank and allowed him to inspect it just as we would have his counsel if he had counsel.

THE COURT: Very well. They desire to submit evidence that the Board knew the prescription pads were stolen and that the forgery aspect of the man's signature on these prescriptions.

MR. GAUSS: Now, we would object to that because that is very clearly an enlargement of the record looking at the Administrative Procedure Act.

THE COURT: I think the only thing I can do is to remand it to the Board and have them go into it assuming that is correct, assuming that we are looking at Number 6252-13-A, Section 19, Subsection D1. How do I get to that point? Don't I have to hear their position to see if there is any grounds that there was a forgery?

MR. GAUSS: I suppose you would but it could not be considered except for the determination of whether it ought to be remanded back for that additional evidence. But in connec-

tion with that, again I would say that there is no testimony to effect that the pads were stolen because he did not testify.

THE COURT: Very well. At this time the rulings are as follows on these four grounds that you desire to have reopened. At this time before a determination is made on the license, I am ruling on the objections of the State so in effect if I overrule his objection I agree with the plaintiff's position. As to the Rules of Procedure, the objection is overruled. As to the portion of the deposition, the objection is granted, I will not consider it. As to the submission of more prescriptions than were identified, I am deferring that ruling because of Mr. Gauss' desire to check the file, but we will go into that. I will give you some time. You say you need to check the file? It should be in the record. And as far as the Board knew the prescription pads were stolen and that they were in fact a forgery, I will take additional testimony to determine whether or not that point should be referred back to the Dental Board for additional examination.

We will take about a 20-minute break and at that point I will come back out and consider these few points. The submitting more prescriptions was deferred and I will consider the testimony relative to a possible referral back to the Board on these grounds and then of course counsel you certainly may at that time mark and tender the Rules of Procedure, I have ruled in your favor on the submission of these rules. Let's take a 20--minute break and we will be back in at 20 minutes to 4:00.

(Whereupon a short recess was taken.)

THE COURT: On the record. All right. At this time we are considering the point of submission of more prescriptions than were actually identified on the record. Mr. Gauss?

MR. GAUSS: Your Honor, I have reviewed this record and I think that the pertinent testimony will be found in what I have marked here, Pages 0-171 to 0-182.

THE COURT: Is that in the Court's record?

MR. GAUSS: It will be offered in evidence. It's not in evidence yet.

THE COURT: You want me to consider it now?

MR. NEWMAN: I would like to see what he is talking

about.

MR. GAUSS: Is there any objection to my going ahead and offering into evidence the Board's record and the Statement of Facts?

THE COURT: If I look at it for a moment.

MR. NEWMAN: Your Honor, if I might, you know, as each one is marked I would like to look at it and agree to it or object to it as he offers them.

THE COURT: Very well. You are offering now into evidence what exhibit?

MR. GAUSS: Your Honor, at this time we would offer Defendant's Exhibit 1 and 1A, all of which is in this brown envelope. One is the additional transcription, reporter's transcription of the testimony, question and answer testimony at the Board hearing and 1A—excuse me, that's 1A what I just described. One are the exhibits which were introduced before the Board in connection with Exhibit 1A, and I also offer Defendant's Exhibit No. 2 which is a certified copy of all of the Board proceedings in these two cases, that is, the complaint and the findings of fact and conclusions of law and the entire Board record.

MR. NEWMAN: May I examine those for a second. We have no objection, Your Honor.

THE COURT: No objection. One, 1A and 2 are admitted into evidence.

Now, counsel if you would, please proceed with one deferred matter.

MR. GAUSS: Your Honor, as I was saying, Exhibit 1A, the part that I have, there are two paper clips in here, and the pertinent testimony is starting at Page 0-71 and goes through to 0-81 or 0-82, and basically what that is, Your Honor, is I traced the chain of possession of the exhibits which counsel is apparently complaining about from a Mr. Fleming to the Department of Public Safety to a Mr. Blood who is an Investigator for the Board to Mr. Hardin who was the Executive Director of the Board and then from there into evidence, a continuus chain of possession. Now, as to whether or not these or many prescriptions were actually submitted to Dr. Crank, the record is not explicit. I don't find anything in there where it says, "Dr.

Crank, I offer those to you for your inspection." But I will say, Your Honor, that I am presuming that as we were going through this chain of command, I mean, chain of possession and these various packets of prescriptions were identified by these various people that they were submitted to Dr. Crank for his inspection. I cannot say that as a fact because frankly my memory is not that clear on it, but I do know that as we were going through this evidence that this was the way that it was handled.

THE COURT: Was Dr. Crank there all this time testimony was going on?

MR. GAUSS: Yes, sir. At all times, he never left the room. And I would say this, that certainly again it goes to the question of whether, you know, not having counsel or not it is still the same old question, they were there for him. They were offered to the Board in evidence and if he had any objection certainly he did not voice it and I think certainly that the Board is entitled to as much presumption that they were shown to him and he had no objections as to presume that they were not.

THE COURT: Well, without even getting into that, you say he was there when this was going on, is that correct?

MR. GAUSS: Yes, sir, absolutely.

THE COURT: Very well. Response, please?

MR. NEWMAN: Your Honor, in reviewing the record, Exhibit B13 was specifically shown to the doctor. He was asked if they were correct.

THE COURT: Where are you reading from?

MR. NEWMAN: This is on Page 46, Your Honor, beginning on Line 18.

THE COURT: All right, go ahead.

MR. NEWMAN: Your Honor, it specifically states that they handed the records to the doctor, asked him to identify them. Now, Page 81 somewhere they introduce Exhibits B14 through B18 and the record is silent that they made any offer of these. Page 81, Your Honor. It is completely silent they made any offer of these to the doctor. They simply said we offer Exhibits B14 through B18.

THE COURT: If you are stating there may not be substantial evidence, would not the record, you know, hold up for itself

as to whether or not there is substantial evidence or not?

MR. NEWMAN: Except for showing violation of their rules, Your Honor, we have to introduce their rules with the rules supplying the missing items.

THE COURT: What do the rules say?

MR. NEWMAN: Well, Your Honor, the rules say one, that all hearings shall be in Austin, Texas unless the Board finds in the public interest that the hearings should be held in another city, and the record is silent as to any such finding but the hearing was in San Antonio, Texas.

THE COURT: What is your response to that?

MR. GAUSS: Well, Your Honor, I could only analogize that to a plea of privilege. This thing was on file for months. They never complained about the—it was set in different places, these different continuances, one time it was set in San Antonio, one time it was set here in Houston and I don't know where the other times were, they have never—and he had a lawyer all this time. They never raised one question about the site of the hearing.

THE COURT: Before now, you mean?

MR. GAUSS: Until after the hearing.

THE COURT: Well, do you feel that is a procedural defect?

MR. GAUSS: Yes, sir, a procedural defect. If so, they waived it, Your Honor. I think a plea of privilege that they don't raise, it's a venue question. Certainly the Board has jurisdiction to hear it anywhere they wanted to and the fact that there is no entry of a finding does not preclude that there was such a finding but whether there was or not, I submit that it had been waived, they did not raise it before the Board.

MR. NEWMAN: Your Honor, again I say that this goes to Dr. Crank's being present without counsel because that was a rule that counsel should have raised when they started the trial.

THE COURT: Very well. Why don't you offer those rules? You are going to?

MR. NEWMAN: Yes, Your Honor. Your Honor, with the Court's permission I am going to remove and use the Rules of Procedure which were attached to the motion to request for admissions, these were the ones that were submitted to counsel with the request for admissions and introduce those.

MR. GAUSS: Well, I have no objection to offering a copy. I do have an objection to the offer.

THE COURT: All right. Overrule the objection.

MR. GAUSS: Note our exception.

MR. NEWMAN: Your Honor, at this time I tender to counsel Plaintiff's Exhibit No. 1 being the Rules of Procedure governing grievance hearings and appeals before the Texas State Board of Dental Examiners. Your Honor, at this time I offer into evidence Plaintiff's Exhibit No. 1.

THE COURT: No. 1 admitted. What section are you looking at?

MR. NEWMAN: All right, Your Honor. The Rule Number 1.1015 is the rule about holding all hearings in Austin, Texas unless the Board finds cause and public interest to hold it elsewhere.

THE COURT: 1.1015?

MR. NEWMAN: Yes, Your Honor.

THE COURT: Mr. Gauss, was there a good and sufficient cause to designate the other place of hearing in the interest of the public?

MR. GAUSS: Yes, sir.

THE COURT: What was that?

MR. GAUSS: The location of the witnesses, the fact that the Board was scheduled to meet in San Antonio on that weekend anyway and to conserve the publicity.

THE COURT: Was there a formal finding of that?

MR. GAUSS: No, sir, not of record.

THE COURT: Go right ahead.

MR. NEWMAN: In that regard, I would ask permission of the Court to let me introduce Plaintiff's Exhibit No. 2. Your Honor, at this time I now tender to counsel what has been marked as Plaintiff's Exhibit No. 2. Your Honor, I offer into evidence a statement of nonexistence of document filed by Mr. Gauss as attorney for the Texas State Board of Dental Examiners which is a certification that there is no written document, photograph or other evidence he knows of showing the finding of the Board of public convenience to hold a meeting or hearing in San Antonio.

MR. GAUSS: Your Honor, we would object to the admis-

sion of this document. Of course, we just got through admitting that there is no such document, but we object to its submission in evidence in this proceeding for the reason that it has absolutely no relevance in view of their failure to establish any finding of proper predicate that they asked for a change or they were harmed by it, that this provides venue if they ask for it.

THE COURT: What do the cases say on this point?

MR. GAUSS: I think there are none, Your Honor.

THE COURT: Overrule the objection. No. 2 is admitted into evidence.

MR. NEWMAN: Your Honor, with this we no longer feel a need to introduce any further evidence except for the deposition of Mr. Del Romano which has been overruled and we rest.

THE COURT: Plaintiff rests. What says the defendant? Anything further before I have to go through all of this, of course, and read it?

MR. GAUSS: No, Your Honor, nothing whatsoever.

THE COURT: Very well, the defense rests?

MR. GAUSS: Correct, Your Honor.

THE COURT: At this time, let's go off the record, but first of all let the record reflect who is here. Dr. Crank is present in the Court and counsel for the plaintiff and defendant are here in Court. Let's go off the record.

(Whereupon a discussion was held off the record.)

THE COURT: Back on the record. We have just had a discussion off the record on the rendering of the decision in this case. What I will do, I will take I would think about ten days to two weeks to go through this. If it's done in a shorter time, so be it, but after it's completed and after I have reached a decision I will set a date and time to officially render this from the bench as far as what the ruling of the Court is, and at that time we can quickly get a written order rendered and any appeal process. I will immediately start reading this. If I can do it quicker than that, I will.

You are stationed where, in Austin?

MR. GAUSS: Yes, sir.

THE COURT: How often do you get in?

MR. GAUSS: On this case, Your Honor, for the last—it's irregular. I can come at the Court's convenience.

THE COURT: When I reach a decision I will place the call first to your office and find the dates that you will be available. I will then call Mr. Newman and Mr. Nathan's office and tell the times we have available and then we will get back with the State. Is it easier for you in the afternoon or the morning?

MR. GAUSS: Your Honor, as long as we can make it no earlier than 10:00 o'clock in the morning, that is fine. There is a flight that leaves—

THE COURT: What time does it leave?

MR. GAUSS: It leaves at 8:00 o'clock in the morning.

THE COURT: How about in the evening, what time is it?

MR. GAUSS: I think there is one that leaves at 1:30 in the afternoon.

THE COURT: What's the one after that?

MR. GAUSS: Coming here there may be none.

THE COURT: No, I am saying going back to Austin.

MR. GAUSS: Oh, going back, 4:40 P.M.

THE COURT: Very well. What we will do, then, I will probably set it for 1:00 o'clock some afternoon. Would that be convenient for you?

MR. NEWMAN: That would be fine.

THE COURT: Another point?

MR. NEWMAN: Yes, Your Honor. We had rested on evidence we thought we would have a chance to argue. I would like to submit a supplemental brief to bring out additional points that are in the record.

THE COURT: That would be fine. Just send him a copy of it.

MR. NEWMAN: Thank you.

(Whereupon the Court was adjourned and the Statement of Facts ended.)

STATE OF TEXAS, COUNTY OF HARRIS

I, Official Court Reporter within and for the 133rd Judicial District of Texas, do hereby certify that the above and foregoing 38 pages contain and constitute a full, true and correct statement of the facts had upon hearing in Cause No. 80-25659 in the District Court of Harris County, Texas, John Cameron Crank, D.D.S. VS. Texas State Board of Dental Examiners; that the said statement of facts contains all of the oral evidence adduced upon the hearing of said cause; all documentary evidence consisting of Plaintiff's Exhibit Nos. 1 and 2 and Defendant's Exhibits Nos. 1, 1A and 2, inclusive which are appended separately hereto; all objections and all rulings and remarks of the Court and all exceptions thereto; that the hearing of said cause was by me reported in shorthand and that the above and foregoing statements of facts is a full, true and correct transcript of my shorthand notes taken during the course of said hearing at the time and place shown by the caption thereto on page one. IN TESTIMONY WHEREOF WITNESS my official hand this ____ day of May, 1981.

Paula Lucchesi, Notary Public
in and for Harris County, Texas

APPENDIX E

TEXAS STATE BOARD OF DENTAL EXAMINERS

Consolidated Findings and Orders of the Board Docketed Complaints Nos. 1979-15 and 1980-1

Texas State Board of Dental Examiners

Vs.

Doctor John Cameron Crank
13205 Cypress N Houston Road
Houston, Harris County, Texas 77429
Holder of Texas Dental License No. 8268
1980 Annaul Registration Number 6375

Order Entered as of May 9, 1980

MEETING OF THE TEXAS STATE BOARD OF DENTAL EXAMINERS, NEW MARIOTT HOTEL, SAN ANTONIO, BEXAR COUNTY, TEXAS, MAY 9, 1980:

On the 9th day of May, 1980, the Texas State Board of Dental Examiners being in called meeting in the Bowie Room of the new Marriott Hotel in San Antonio, Bexar County, Texas, such meeting being called for the purpsoe of hearing and considering the instant business, and a quorum and a majority of the membership of the Texas State Baord of Dental Examiners being present, to-wit:

Dr. Randolph D. Minatra, President
Dr. M. James Moritz, President-Elect
Dr. William J. Kemp, 1st Vice-President

Dr. John D. Wilbanks, 2nd Vice-President
Dr. James S. Rogers, Secretary-Treasurer
Dr. S. H. Rabon
Dr. Donald L. Brunson
Dr. Wm. Richard Knight, Jr. (absent excused)
Dr. Neil A. Morgan

Respondent, Dr. John Cameron Crank, and his counsel of Record, the Hon. Gerald T. Holtzman, being present in person and the Assistant Attorney General of Texas, the Hon. Bob Gauss, representing the State of Texas being also present, the President of the Board, Dr. Randolph D. Minatra, called Docketed Complaints Numbers 1979-15 and 1980-1 for hearing. RESPONDENT did then and there announce and inform the Board that he no longer desired Mr. Holtzman to represent him and that he desired other counsel. Mr. Holtzman then left the hearing room and Dr. Crank requested that he be granted another continuance on the grounds that he was not represented by counsel and that it was impossible for him to adequately defend himself and that if he were forced to defend himself without counsel he would be denied "due process." The Board then unanimously voted to deny his request for a further postponement/continuance and ordered the hearings to proceed.

The Board did then hear and receive all testimony and evidence offered and at the conclusion thereof did then and there close said hearing on both complaints and did then and there make the following UNANIMOUS FINDINGS AND ORDERS, to-wit:

I.
FINDINGS OF FACT

1. That RESPONDENT, JOHN CAMERON CRANK, D.D.S., is licensed to practice dentistry in Texas and possesses Texas Dental License No. 8268 previously issued to him on June 20, 1966 by the Texas State Board of Dental Examiners, duly authorized to issue such license; that the said RESPONDENT now resides and practices dentistry in Houston, Harris County, Texas; and, the Board further finds that all statutory

requirements to its jurisdiction have been met. (Exhibit B-1)

2. That Docketed Complaint No. 1979-15 was mailed to John Cameron Crank (licensee) by registered mail on October 2, 1979; signed for on October 9, 1979. (Exhibit B-2)

3. That Complaint No. 1979-15 was originally set for hearing on November 2, 1979 and licensee was so notified by registered mail, mailed on October 2, 1979; signed for on October 9, 1979. (Exhibit B-4)

4. That the hearing on Complaint No. 1979-15 scheduled for November 2, 1979 was postponed, at licensee's request and rescheduled for December 1, 1979; notice mailed by registered mail to licensee on November 9, 1979; signed for on November 13, 1979. (Exhibit B-5)

5. That the hearing on 1979-15 scheduled for December 1, 1979 was postponed at licensee's request and rescheduled for February 29, 1980; notice mailed by registered mail to licensee on December 6, 1979; signed for on December 11, 1979. (Exhibit B-6)

6. That the hearing on 1979-15 scheduled for February 29, 1980 was rescheduled for March 1, 1980 (one day later) and licensee notified by registered mail letter mailed on January 14, 1980; signed for on January 17, 1980. (Exhibit B-7)

7. That the hearing on 1979-15 scheduled for March 1, 1980 was postponed at the instance of the Board (absent witness) and rescheduled for May 9, 1980, at the Marriott Hotel in San Antonio, Texas. Notice mailed by registered mail to licensee on April 1, 1980; signed for on April 2, 1980. (Exhibit B-9)

8. Docketed Complaint No. 1980-1 was mailed to licensee by registered mail on March 24, 1980; signed for on March 27, 1980, advising licensee that Docketed Complaint No. 1980-1 was scheduled for hearing on May 9, 1980 at the Marriott Hotel in San Antonio, Texas. (Exhibits B-3 and B-8)

9. Gerald T. Holtzman, Attorney of Record for Licensee, wrote the Board Office on April 25, 1980, received in the Board Office on April 28, 1980, asking for a continunce of the hearings scheduled for May 9, 1980 in San Antonio, Texas, such communication was not in accordance with Board Rules; however, the Board unanimously denied such request on both Docketed Complaints Numbers 1979-15 and 1980-1 by Board Order

dated April 30, 1980, labeled *Order Denying Motion for Continuance* and mailed by certified mail to Gerald Holtzman at his Houston, Texas address, and signed for on May 5, 1980.

10. Licensee has been represented by the Honorable Gerald T. Holtzman of Houston, Texas, attorney at law, in Complaint No. 1979-15 until May 9, 1980 and is listed as the Attorney of Record in the Records of the Board.

11. Licensee appeared before the Board at approximately 9:00 A.M., May 9, 1980, and at about 9:30 A.M., May 9, 1980, the Honorable Gerald T. Holtzman appeared before the Board with licensee and announced to the Board that, because of basic philosophical differences, he could no longer effectively represent licensee and licensee advised the Board that he did not want Mr. Holtzman to represent him further.

12. Licensee requested the Board to grant another postponement grounded upon his lack of legal representation. Such request was made on May 9, 1980, after Mr. Holtzman's withdrawal from the case and such request was thereupon unanimously denied by the Board.

13. Previously, on May 8, 1980, at about 4:00 P.M., Mr. Carl C. Hardin, Jr., Executive Director of the Board, and Mr. Robert Gauss, Assistant Attorney General, counsel for the Board, received a conference phone call in the room of Mr. Hardin at the Marriott Hotel, San Antonio, Texas.

14. The caller identified himself as being a Mr. Nathan, attorney at law, of Houston, Texas. The caller stated that he had been approached by the licensee on the previous day (May 7, 1980), with the view of hiring Mr. Nathan to represent licensee in these proceedings.

15. The caller stated that Mr. Holtzman was no longer on the case and that he, the caller, could not adequately represent licensee on such short notice; that unless another postponement were granted, he opined, licensee would be deprived of representation and consequently deprived of due process of law.

16. At no time has a formal request for a postponement, in accordance with Board Rules, been made to postpone the hearings from their scheduled time of May 9, 1980.

II.

The Board proceeded to hear evidence on both complaints. Based on the evidence, the Board further makes the following additional UNANIMOUS Findings of Fact:

17. On July 21, 1979, licensee, John Cameron Crank, D.D.S., did write a prescription for 36 Dilaudid capsules to one Richard Romano (Docketed Complaint No. 1979-15, Exhibit 1).

18. Richard Romano was not, at that time, nor has he ever been a patient of licensee.

19. Romano paid licensee $750.00 for the prescription for 36 Dilaudid capsules of 4 mg. each.

20. On the date of the above transaction, licensee and Romano had never met nor seen each other before.

21. Romano was, in fact, an undercover agent for the Narcotics Division of the Pasadena, Texas Police Department.

22. Upon the completion of the transaction, Romano identified himself as being a police officer and placed the licensee under arrest.

23. Dilaudid is a Schedule II controlled substance. Dilaudid is a much abused "street drug."

24. Dilaudid is a narcotic drug and is highly addictive.

25. The only therapeutic use for Dilaudid is for the relief of extreme pain, such as in terminal cancer patients.

26. Conceivably, Dilaudid might be indicated in dental treatment for the relief of extreme pain caused by severe injury to the oral cavity, mouth or face; however, even then only a 2 mg. pill or capsule would be indicated.

27. The 36 pills prescribed by licensee to Romano were 4 mg. each.

28. That on or about the dates indicated, the licensee either prescribed or acquiesced in the use of his name as a prescribing dentist, 4 mg. Dilaudid pills to the persons indicated and in the quantities indicated:

(1) May 5, 1979 to Shelley Daniels, quantity 40 (DC 1979-15, Exh. 2)

(2) May 7, 1979 to Shelley Daniels, quantity 75 (DC 1979-15, Exh. 3)
(3) May 10, 1979 to Shelley Daniels, quantity 75 (DC 1979-15, Exh. 4)
(4) May 12, 1979 to Shelley Daniels, quantity 75 (DC 1979-15, Exh. 5)
(5) May 14, 1979 to Shelley Daniels, quantity 80 (DC 1979-15, Exh. 6)
(6) May 17, 1979 to Shelley Daniels, quantity 75 (DC 1979-15, Exh. 7)
(7) May 21, 1979, 1979 to Shelley Daniels, quantity 140 (DC 1979-15, Exh. 8)
(8) March 31, 1979 to Fred Johnson, quantity 20 (DC 1979-15, Exh. 9)
(9) April 2, 1979 to Fred Johnson, quantity 20 (DC 1979-15, Exh. 10)
(10) April 9, 1979 to Fred Johnson, quantity 24 (DC 1979-15, Exh. 11)
(11) April 11, 1979 to Fred Johnson, quantity 24 (DC 1979-15, Exh. 12)
(12) April 14, 1979 to Fred Johnson, quantity 24 (DC 1979-15, Exh. 13)
(13) April 17, 1979 to Fred Johnson, quantity 28 (DC 1979-15, Exh. 14)
(14) April 18, 1979 to Fred Johnson, quantity 36 (DC 1979-15, Exh. 15)
(15) April 20, 1979 to Fred Johnson, quantity 24 (DC 1979-15, Exh. 16)
(16) April 26, 1979 to Fred Johnson, quantity 75 (DC 1979-15, Exh. 17)
(17) April 20, 1979 to Fred Johnson, quantity 24 (DC 1979-15, Exh. 18)
(18) May 8, 1979 to Fred Johnson, quantity 75 (DC 1979-15, Exh. 19)
(19) May 10, 1979 to Fred Johnson, quantity 75 (DC 1979-15, Exh. 20)
(20) May 12, 1979 to Fred Johnson, quantity 80 (DC 1979-15, Exh. 21)

(21) May 15, 1979 to Fred Johnson, quantity 80 (DC 1979-15, Exh. 22)
(22) May 19, 1979 to Fred Johnson, quantity 75 (DC 1979-15, Exh. 23)

29. All of the prescriptions to Shelley Daniels and to Fred Johnson enumerated in (1) - (22) (DC 1979-15, Exh. 2 - 23) were on the printed form of the licensee.

30. The prescription represented by Exhibit 1 of the complaint (DC 1979-15) was filled out and signed by the licensee.

31. The prescriptions represented by Exhibits 11, 16 and 18 to the complaint appear to be in the handwriting of the licensee, including the signature.

32. The prescriptions represented by Exhibits 2 through 10; 12 through 15; 17 and 19 through 23 of the complaint appear to be in the same handwriting as Exhibit 1 of the complaint (DC 1979-15) other than the signature.

III.

(33) The Board further makes the following additional UNANIMOUS FINDINGS OF FACT that on or about the dates indicated, Licensee, John Cameron Crank, D.D.S., prescribed as the prescribing dentist, 4 mg. DILAUDID pills to the persons indicated and in the quantities indicated:

(1) June 2, 1977 to Frank Beard, quantity 100 (DC 1980-1, Exh. 1)
(2) June 6, 1977 to Frank Beard, quantity 100 (DC 1980-1, Exh. 2)
(3) July 11, 1977 to Frank Beard, quantity 20 (DC 1980-1, Exh. 3)
(4) July 18, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 4)
(5) July 20, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 5)
(6) July 21, 1977 to Frank Beard, quantity 100 (DC 1980-1, Exh. 6)

(7) August 4, 1977 to Frank Beard, quantity 100 (DC 1980-1, Exh 7)
(8) August 8, 1977 to Frank Beard, quantity 100 (DC 1980-1, Exh. 8)
(9) December 14, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 9)
(10) December 16, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 10)
(11) December 19, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 11)
(12) December 21, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 12)
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(14) December 26, 1977 to Frank Beard, quantity 50 (DC 1980-1, Exh. 14)
(15) January 3, 1978 to Frank Beard, quantity 75 (DC 1980-1, Exh. 15)
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(24) April 20, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 24)
(25) April 25, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 25)

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(30) May 6, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 30)
(31) May 9, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 31)
(32) May 9, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 32)
(33) May 13, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 33)
(34) May 15, 1978 to Frank Beard, quantity 30 (DC 1980-1, Exh. 34)
(35) May 16, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 35)
(May 18, 1978 to Frank Beard, quantity 30 (DC 1980-1, Exh. 36)
(36) May 18, 1978 to Frank Beard, quantity 30 (DC 1980-1, Exh. 36)
(37) May 19, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 37)
(38) May 22, 1978 to Frank Beard, quantity 30 (DC 1980-1, Exh. 38)
(39) May 24, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 39)
(40) May 17, 1978 to Frank Beard, quantity 40 (DC 1980-1, Exh. 40)
(41) May 26, 1977 to Shelley Johnson, quantity 75 (DC 1980-1, Exh. 41)
(42) May 27, 1977 to Shelley Johnson, quantity 100 (DC 1980-1, Exh. 42)
(43) May 31, 1977 to Shelley Johnson, quantity 100 (DC 1980-1, Exh. 43)

(44) June 1, 1977 to Shelley Johnson, quantity 100 (DC 1980-1, Exh. 44)
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(62) June 30, 1977 to Shelley Johnson, quantity 125 (DC 1980-1, Exh. 62)

(63) June 30, 1977 to Shelley Johnson, quantity 200 (DC 1980-1, Exh. 63)
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(76) August 5, 1977 to Shelley Johnson, quantity 150 (DC 1980-1, Exh. 76)
(77 August 6, 1977 to Shelley Johnson, quantity 150 (DC 1980-1, Exh. 77)
(78 August 8, 1977 to Shelley Johnson, quantity 150 (DC 1980-1, Exh. 78)
(79) August 9, 1977 to Shelley Johnson, quantity 150 (DC 1980-1, Exh. 79)
(80) May 26, 1977 to Fred Johnson, quantity 75 (DC 1980-1, Exh. 80)
(81) May 27, 1977 to Fred Johnson, quantity 100 (DC 1980-1, Exh. 81)

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(117) August 6, 1977 to Fred Johnson, quantity 150 (DC 1980-1, Exh. 117)
(118) August 8, 1977 to Fred Johnson, quantity 150 (DC 1980-1, Exh. 118)
(119) August 9, 1977 to Fred Johnson, quantity 150 (DC 1980-1, Exh. 119)

(120) August 15, 1977 to Fred Johnson, quantity 150 (DC 1980-1, Exh. 120)
(121) June 2, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 121)
(122) June 6, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 122)
(123) July 15, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 123)
(124) August 2, 1977 to Cathy Mouser, quantity 30 (DC 1980-1, Exh. 124)
(125) August 4, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 125)
(126) August 8, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 126)
(127) August 12, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 127)
(128) August 15, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 128)
(129) August 20, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 129)
(130) August 22, 1977 to Cathy Mouser, quantity 100 (DC 1980-1, Exh. 130)
(131) December 15, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 131)
(132) December 16, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 132)
(133) December 19, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 133)
(134) December 21, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 134)
(135) December 22, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 135)
(136) December 27, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 136)
(137) December 28, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 137)
(138) December 29, 1977 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 138)

(139) January 4, 1978 to Cathy Mouser, quantity 75 (DC 1980-1, Exh. 139)
(140) January 6, 1978 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 140)
(141) January 12, 1978 to Cathy Mouser, quantity 50 (DC 1980-1, Exh. 141)
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(153) May 13, 1978 to Cathy Mouser, quantity 40 (DC 1980-1, Exh. 153)
(154) May 15, 1978 to Cathy Mouser, quantity 30 (DC 1980-1, Exh. 154)
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(156) May 18, 1978 to Cathy Mouser, quantity 30 (DC 1980-1, Exh. 156)
(157) May 19, 1978 to Cathy Mouser, quantity 40 (DC 1980-1, Exh. 157)

(158) May 23, 1978 to Cathy Mouser, quantity 40 (DC 1980-1, Exh. 158)
(159) July 5, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 159)
(160) July 7, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 160)
(161) July 9, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 161)
(162) July 18, 1977 to Steve Willeford, quantity 200 (DC 1980-1, Exh. 162)
(163) July 19, 1977 to Steve Willeford, quantity 200 (DC 1980-1, Exh. 163)
(164) July 20, 1977 to Steve Willeford, quantity 200 (DC 1980-1, Exh. 164)
(165) July 21, 1977 to Steve Willeford, quantity 200 (DC 1980-1, Exh. 165)
(166) July 22, 1977 to Steve Willeford, quantity 200 (DC 1980-1, Exh. 166)
(167) July 23, 1977 to Steve Willeford, quantity 200 (DC 1980-1, Exh. 167)
(168) August 3, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 168)
(169) August 4, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 169)
(170) August 6, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 170)
(171) August 8, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 171)
(172) August 9, 1977 to Steve Willeford, quantity 150 (DC 1980-1, Exh. 172)
(173) August 15, 1977 to Steve Willeford, quantity 100 (DC 1980-1, Exh. 173)

IV.

The Board FURTHER UNANIMOUSLY FINDS that the Licensee, Dr. John Cameron Crank, because of the Acts and Conduct set forth and alleged in Docketed Complaints

Nos. 1979-15 and 1980-1 and herein found to be true, as detailed hereinbefore, did thereby violate the following statutes and Rules pertaining to Dentistry, to-wit:

(1) Article 4551h — Narcotic Drugs, Dangerous Drugs, Controlled Substances, Vernon's Texas Civil Statutes, as amended;

(2) Subsection (c) of the Second portion of Article 4549, Vernon's Texas Civil Statutes, as amended;

(3) Code of Federal Regulations — subparagraph (a) of Section 1306.4 of the Federal Controlled Substances Act — Purpose of Issue of Prescription;

(4) U.S.C.A. — Title 21, Chapter 13 — Drug Abuse, Prevention, Control; Part D. — Offenses and Penalties Section 841 — Prohibited Acts A — Unlawful Acts, sub (a) and (1)

V.

CONCLUSIONS OF LAW ON DOCKETED COMPLAINT NO. 1979-15

Said Licensee, Dr. John Cameron Crank, by prescribing 36-4 mg. DILAUDID pills for Richard Romano; 480-4 mg. DILAUDID pills for Shelley Daniels and 684-4 mg. DILAUDID pills for Fred Johnson, said Licensee is:

(1) Guilty of prescribing a Controlled Substance not necessary or required for medicinal or therapeutic purposes;

(2) Guilty of prescribing a Controlled Substance in a manner which would promote addiction thereto;

(3) Guilty of dishonorable conduct in the practice of dentistry;

(4) Guilty of violating the Federal Controlled Substances Act and the Texas Dangerous Drug Act.

Further, that *each* of such acts of Licensee in so prescribing the numbers of 4 mg. DILAUDID pills for the named persons (1) Richard Romero, (2) Shelley Daniels, and (3) Fred Johnson is grounds for the revocation and cancellation

of Texas Dental License No. 8268 previously issued to Dr. John Cameron Crank.

VI.
CONCLUSIONS OF LAW
ON
DOCKETED COMPLAINT NO. 1980-1

Said Licensee, Dr. John Cameron Crank, by prescribing:
(1) 2,015 4 mg. DILAUDID pills for Frank Beard,
(2) 5,050 4 mg. DILAUDID pills for Shelley Johnston,
(3) 5,250 4 mg. DILAUDID pills for Fred Johnson,
(4) 2,085 4 mg. DILAUDID pills for Cathie Mauser,
(5) 2,500 4 mg. DILAUDID pills for Steve Willeford,
said Licensee is:

(1) Guilty of prescribing a Controlled Substance not necessary or required for medicinal or therapeutic purposes;

(2) Guilty of prescribing a Controlled Substance in a manner which could promote addiction thereto;

(3) Guilty of dishonorable conduct in the practice of dentistry;

(4) Guilty of violating the Federal Controlled Substances Act and the Texas Dangerous Drug Act.

Further, that *each* of such acts of Licensee in so prescribing the number of 4 mg. DILAUDID pills for the named persons (1) Frank Beard, (2) Shelley Johnson, (3) Fred Johnson, (4) Cathie Mauser and (5) Steve Willeford is grounds for the revocation and cancellation of Texas Dental License No. 8268 issued to Dr. John Cameron Crank.

The Board UNANIMOUSLY DECIDES that the FACTS BROUGHT OUT AT SUCH HEARING ON Docketed Complaint No. 1979-15 JUSTIFY AND REQUIRE THE FOLLOWING ORDERS, to-wit:

(1) *Based on* the Findings of said Licensee's prescribing DILAUDID for patient RICHARD ROMANO, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby

REVOKED AND CANCELLED (Docketed Complaint No. 1979-15).

(2) *Based on* the findings of said Licensee's prescribing DILAUDID for SHELLEY DANIELS, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1979-15).

(3) *Based on* the findings of said Licensee's prescribing DILAUDID for FRED JOHNSON, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1979-15).

VIII.

The Board FURTHER UNANIMOUSLY FINDS that the FACTS BROUGHT OUT AT SUCH HEARING on Docketed Complaint No. 1980-1 JUSTIFY AND REQUIRE THE FOLLOWING ORDERS, to-wit:

(4) *Based on* the Findings of said Licensee's prescribing DILAUDID for FRANK BEARD, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1980-1)

(5) *Based on* the Findings of said Licensee's prescribing DILAUDID for SHELLEY JOHNSON, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1980-1)

(6) *Based on* the Findings of said Licensee's prescribing DILAUDID for FRED JOHNSON, it is HEREBY

ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1980-1)

(7) *Based on* the Findings of said Licensee's prescribing DILAUDID for CATHIE MAUSER, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1980-1)

(8) *Based on* the Findings of said Licensee's prescribing DILAUDID for STEVE WILLEFORD, it is HEREBY ORDERED that Texas Dental License No. 8268, previously issued by the Texas State Board of Dental Examiners to JOHN CAMERON CRANK, D.D.S. is hereby *REVOKED AND CANCELLED* (Docketed Complaint No. 1980-1)

IX.

The Texas State Board of Dental Examiners UNANIMOUSLY FINDS that the continued Licensure and Practice of Dr. John Cameron Crank, the Texas Dental Licensee herein, constitutes An IMMENENT PERIL to the PUBLIC HEALTH, SAFETY AND WELFARE of this State; therefore, this ORDER in its entirety shall have immediate effect on the date it is mailed to said Licensee at 13205 Cypress N. Houston Road, Houston, Texas 77429, his office address. It is further UNANIMOUSLY ORDERED that no motion for rehearing will be necessary for an appeal and no such motion will be entertained.

X.

The above FINDINGS AND ORDERS of the Texas State Board of Dental Examiners are ORDERED to be entered as the UNANIMOUS FINDINGS AND

ORDERS of the Board, a quorum and a majority of members of such Board being present and participating in such hearing, deliberations and decision, and such FINDINGS AND ORDERS are made this the 9th day of May, 1980 in San Antonio, Bexar County, Texas. This ORDER shall be effective and final immediately.

The Secretary of the Board is hereby ORDERED to prepare the Board's FINDINGS AND ORDERS in appropriate form and submit same to the members of the Board for their signatures and to mail a copy of same to the Licensee, Dr. John Cameron Crank, at his last known address.

/s/ Randolph D. Minatra, D.D.S.
President

/s/ M. James Moritz, D.D.S.
President-Elect

/s/ William J. Kemp, D.D.S.
First Vice-President

/s/ John D. Wilbanks, D.D.S.
Second Vice-President

/s/ S. H. Rabon, D.D.S.

/s/ Donald L. Brunson, D.D.S.

/s/ Wm. Richard Knight Jr. D.D.S.
(Absent excused—not participating)

/s/ Neil A. Morgan, D.D.S.

/s/ James S. Rogers, D.D.S.
Secretary-Treasurer

(3)

NO. 83-2096

* * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * * * * * * * *

JOHN CAMERON CRANK,

Petitioner

VS.

TEXAS STATE BOARD OF DENTAL EXAMINERS

Respondent

* * * * * * * * *

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

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9pp

QUESTION PRESENTED

Whether a licensee is constitutionally entitled to a continuance of an administrative hearing to allow licensee to retain new legal counsel where the lack of representation is occasioned by the voluntary dismissal of counsel of several months standing, by licensee, after the hearing is formally convened.

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NO. 83-2096

* * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * * * * * * * *

JOHN CAMERON CRANK,

Petitioner

VS.

TEXAS STATE BOARD OF DENTAL EXAMINERS

Respondent

* * * * * * * * *

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Texas State Board of Dental Examiners files this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The Texas Supreme Court entered an opinion February 1, 1984 and, following the grant of a motion for rehearing, withdrew the slip opinion of its February 1 opinion and rendered a second opinion March 21, 1984. The February 1, 1984 opinion is reported at 27 Tex.Sup.Ct.Jour. 191, and, evidently, is not reported in the Southwest Reporter (Pet.App.B). The March 21, 1984 opinion is reported at 27 Tex.Sup.Ct.Jour. 287, 666 S.W.2d 91 (1984) (Pet.App.A). The opinion of the Court of Appeals, Twelfth Supreme Judicial District, Tyler is reported at 658 S.W.2d 182 (1983) (Pet.App.C).

STATEMENT

An administrative hearing was convened, after due notice, on May 9, 1980. After the formal opening of the hearing, Petitioner appeared with his counsel of several months' standing in open meeting, discharged his counsel, and then requested a postponement of the hearing to allow him time to hire another lawyer. Petitioner previously had been granted two postponements; his most recent request, prior to the hearing, had been denied. This denied request was not grounded on a desire to change lawyers, and the petition does not complain about that denial.

Although Petitioner, throughout these appellate proceedings, has persisted in his averments that his counsel was *permitted* to withdraw, such averment is without substance and is refuted by the record. (Pet.App.A, 2,3). There is nothing in the record to indicate that petitioner or his counsel ever sought permission of the Board for the attorney to withdraw; as a matter of fact, the record reflects the attorney was present and ready to proceed. Petitioner cites no authority for the proposition that the Board had the power to require him to proceed with an attorney with whom petitioner was dissatisfied.

REASONS WHY PETITION FOR WRIT SHOULD NOT BE GRANTED

The Texas Supreme Court properly held that the denial of a continuance, under the circumstances, was not a violation of due process rights guaranteed by the United States Constitution.

ARGUMENT

Even if, as Petitioner argues, the Respondent Board *permitted* Petitioners' counsel to withdraw, the "matter of continuance is traditionally within the discretion of the [administrative agency], and it is not every denial of a request for more time that violates due process *even if the party . . . is compelled to defend without counsel.*" (Emphasis added) *Ungar vs. Sarafite*, 376 U.S. 575, 589 (1964). In the case at bench the record is clear that Petitioner, for his own reasons, discharged

his lawyer after the hearing convened. The April 28, 1980 request for a continuance had been denied. Petitioner, at the hearing, offered, as his only reason for another postponement, the vague statement that he and his lawyer had reached a philosophical difference. No testimony or explanation was offered to edify the Respondent Board. The record reflects that Petitioner acknowledged the competency of his attorney, and that the attorney was present and ready to proceed.

This Court, in *Morris vs. Slappy*, ____U.S.____, 103 S.Ct. 1610, 51 USLW 4399 (1983) reinforced *Ungar*. Neither *Morris* nor *Ungar* was a criminal case, although *Morris* was a habeas corpus action growing out of a criminal conviction and *Ungar* was contempt action. Respondent has no quarrel with the general proposition that an accused respondent has a right to counsel in administrative proceedings; in fact, such right is statutorily provided in Art. 6252-13a, V.T.C.S., the Administrative Procedure and Texas Register Act. However, the right to legal representation is not an issue in this case; what is in issue is this: may a respondent in an administrative proceeding discharge his attorney, for vague, unexplained reasons, during the proceedings, and thereby, constitutionally be entitled to a continuance because he has no representation?

CONCLUSION

Morris and *Ungar* are completely dispositive of this question, and the Petition for Writ of Certiorari should be denied.

Respectfully sumitted,

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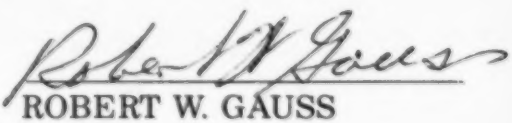
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served by depositing same in the United States mail, certified, return receipt requested addressed to: Charles D. Reed, 1250 Eye Street N.W., Washington, D.C. 20006, on this 17 day of July, 1984.



ROBERT W. GAUSS